(25)

No. 04-340

IN THE

Supreme Court of the United States

SAN REMO HOTEL, L.P., THOMAS FIELD, ROBERT FIELD AND T & R INVESTMENT CORP.,
Petitioners,

v.

CITY AND COUNTY OF SAN FRANCISCO, DEPARTMENT OF CITY PLANNING, CITY PLANNING COMMISSION, BOARD OF PERMIT APPEALS, BOARD OF SUPERVISORS OF THE CITY AND COUNTY OF SAN FRANCISCO,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY ON THE MERITS

PAUL F. UTRECHT *
ANDREW M. ZACKS
ZACKS UTRECHT & LEADBETTER, P.C.
235 Montgomery Street
Suite 1130
San Francisco, CA 94104
(415) 956-8100

* Counsel of Record

Attorneys for Petitioners

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

TABLE OF CONTENTS

INTRODUCTION 1

I. THIS COURT HAS ALREADY DECIDED THAT PLAINTIFFS REQUIRED TO PURSUE STATE COURT ACTIONS BEFORE THEIR FEDERAL CLAIMS MAY BE CONSIDERED SHOULD NOT BE PRECLUDED BY THE STATE COURT DETERMINATION 4

A. This Court Was Well Aware of the Full Faith and Credit Act When it Decided *Williamson County* ... 5

B. The City's Remaining Arguments Merely Point out the Inherent Costs of Permitting Two Separate Proceedings, Which this Court Accepted When it Decided *Pullman* and *Williamson County* 10

1. The City's Observations that Other Bodies of Federal Law Do Not Present the Same Issues as *Williamson County*'s Rule Permitting Two Proceedings Merely Point out the Obvious Costs That Were Fully Considered by this Court Long Ago 11

2. The Field Brothers Followed *Williamson County*'s Procedures: Their Actions Provide No Reason to Reconsider Their Right to a Full Merits determination of their Constitutional Claims 12

3. The City's Argument That *Williamson County* is Costly to Cities is Hardly an Answer to the Field Brothers' Right to Have Their Ripe Constitutional Claims Heard and Is, in any Event, False 14

II. UNDER CALIFORNIA LAW, A DECISION UNDER STATE LAW THAT THE FIELD BROTHERS' COMPLAINT DID NOT STATE A CLAIM FOR COMPENSATION HAS NO PRECLUSIVE EFFECT ON THE FIELD BROTHERS' FEDERAL TAKINGS CLAIMS .. 15

CONCLUSION 17

TABLE OF AUTHORITIES

Cases:

Calhoun v. Franchise Tax Board,
20 Cal.3d 881, 574 P.2d 763 (1978) 16

DLX, Inc. v. Kentucky,
381 F.3d 511 (6th Cir.2004) 10

England v. Louisiana State Board of Medical Examiners, 375 U.S. 411 (1964) ... *passim*

Federated Department Stores, Inc. v. Moitie,
452 U.S. 394 (1981) 5

Lumpkin v. Jordan, 49 Cal.App.4th 1223,
57 Cal.Rptr.2d 303 (1996) 16

Migra v. Warren City School District Board,
465 U.S. 75 (1984) 17

Oklahoma City v. Tuttle, 471 U.S. 808 (1985) 13

Penn Central Transportation Co. v. City of New York,
438 U.S. 104 (1978) 7, 13

Railroad Commission of Texas v. Pullman Co.,
312 U.S. 496 (1941) ..... *passim*

San Remo Hotel v. City and County of San Francisco,
145 F.3d 1095 (9th Cir. 1998) (*San Remo I*) 13

San Remo Hotel v. City and County of San Francisco,
364 F.3d 1088 (9th Cir. 2004) (*San Remo III*) 16

Santini v. Connecticut Hazardous Waste Management Service, 342 F.3d 118 (2d Cir. 2003) 2, 5, 8-10

Suitum v. Tahoe Regional Planning Agency,
520 U.S. 725 (1994) 9

University of Tennessee v. Elliott,
478 U.S. 788 (1986) 5, 6

Wilkinson v. Pitkin County Bd. of County Commissioners,
142 F.3d 1319 (10th Cir. 1998) 6

Williamson County Planning Commission v. Hamilton Bank of Johnson City, 473 U.S. 172 (1985) . *passim*

Yee v. City of Escondido, 503 U.S. 519 (1992) 13

Constitutional and Statutory Provisions, Rules

U.S. Const. Fifth Amend. ..... *passim*
28 U.S.C. § 1738 ..... *passim*
42 U.S.C. § 1983 17
HCO § 41.13(f) 15
S. Ct. Rule 15.2 13

Other Authorities

Berger, Michael and Kanner, Gideon, *Shell Game! You Can't Get There From Here: Supreme Court Ripeness Jurisprudence in Takings Cases at Long Last Reaches the Self-Parody Stage*, 36 Urb. Law. 671 (2004) 6

Davis, K., Administrative Law Treatise,
Vol. 4 (2d ed. 1983) 5, 6

INTRODUCTION

Twelve years ago, the Field Brothers filed claims under the Fifth Amendment to the United States Constitution. Since then, the City and County of San Francisco argued at every turn, and for many reasons, that the Field Brothers' constitutional claims may not be heard on their merits in federal court. And for good reason: the Field Brothers have presented compelling claims under the Fifth Amendment. The City's $567,000 permit condition to allow the Field Brother to continue their decades-long and duly-licensed operation of the San Remo Hotel is an unconstitutional exaction.

Here, the City's many arguments that the Field Brothers' constitutional claims should not be heard have dwindled to one. In this Court, the City argues that the Full Faith and Credit Act requires that this Court affirm the dismissal of the Field Brothers's ripened constitutional claims before they have been considered on the merits by any court, in any jurisdiction.

This Court has already answered the City's argument. Where litigants are required to pursue state law claims in state court before they are permitted to pursue federal claims, they are entitled to a full federal court determination on the merits of their claims. That was this Court's *holding* in *England v. Louisiana State Board of Medical Examiners*, 375 U.S. 411 (1964). As this Court emphasized:

> The line drawn should be bright and clear, so that litigants shunted from federal to state courts . . . will not be exposed . . . to procedural traps operating to deprive them of their right to a District Court determination of their federal claims.

Id. at 418; see also *Santini v. Connecticut Hazardous Waste Management Service*, 342 F.3d 118, 127-130 (2d Cir. 2003).

The line is "bright and clear" for good reasons. After a state court decides state law issues, the federal courts are the only courts left to hear the remaining federal constitutional claims. Any other line would defeat the rights of plaintiffs with ripened federal claims to have a court, in some jurisdiction, somewhere, resolve their federal claims under federal law.

The City will have nothing of *England*'s bright line, or the settled principles that required it. For Takings cases only, the City argues, plaintiffs with ripe federal constitutional claims are not entitled to consideration of their claims under federal law by any court. After the state court renders a decision under state compensation law, the City concludes, "no alleged state or local taking claim need ever give rise to a meritorious federal claim." Resp. Brf. 27. Under the City's view, the only issue left for the federal courts is whether state preclusion laws permit the federal court to decide the federal Takings claims.

As a necessary corollary, there will rarely, if ever, be a federal issue that will "give rise" to this Court's jurisdiction. This Court would have no jurisdiction over the state court decisions required under *Williamson County* since those decisions would involve only state law, and this Court would have no jurisdiction over federal court judgments because those judgments would be limited to state law preclusion issues. As the City concedes, this Court would have jurisdiction to consider federal Takings claims only when state compensation law denies Fifth Amendment rights on its face or when state preclusion law *permits* the federal courts to consider the merits of the federal claims. Resp. Brf. 25-27. In short, the Supremacy Clause would be reversed -- for Takings cases only and solely because of this Court's own decisions.

The cities would be elated. But their wish does not make it so, especially when the wish is to limit this Court's jurisdiction and change its settled decisions. Far from abandoning the principles set out in *England* for *Pullman*-abstention cases, this Court's *Williamson County* decision is completely consistent with *England*'s principles. Under *Williamson County*, after the state litigation required to ripen their Takings claims, plaintiffs may either (1) obtain compensation from the state courts under state law and thus moot the federal constitutional claim or (2) obtain federal court review when the state courts deny compensation. *Williamson County*, 473 U.S. at 194-195. No other result would provide plaintiffs with ripe constitutional claims a forum to resolve those claims, or protect the rights of federal courts to determine their role in deciding federal constitutional claims.

Three years ago, the Field Brothers met the ripeness requirements of *Williamson County*, but the lower federal courts have refused to decide the merits of their ripe claims under the Fifth Amendment. This Court should remand the case for full consideration of the Field Brothers' claims on the merits.

I. THIS COURT HAS ALREADY DECIDED THAT PLAINTIFFS REQUIRED TO PURSUE STATE COURT ACTIONS BEFORE THEIR FEDERAL CLAIMS MAY BE CONSIDERED SHOULD NOT BE PRECLUDED BY THE STATE COURT DETERMINATIONS

The City has never denied the dispositive points in this appeal. The Field Brothers have ripened their federal Takings claims under *Williamson County* and the Field Brothers' ripened federal claims have not been decided on the merits by any court in any jurisdiction.

For the City, that result is perfectly reasonable. Indeed, the City believes that, under *Williamson County*, "no alleged state or local taking need ever give rise to a meritorious federal claim." Resp. Brf. 27. For the City, *Williamson County* stands for the federal courts' virtually unflagging relegation of jurisdiction over federal Takings claims to the state courts.

That was not this Court's decision in *Williamson County Planning Commission v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985). Indeed, no *phrase* in the *Williamson County* opinion even suggests that it is permissible to deny plaintiffs review of their ripe federal claims by any court, in any jurisdiction. With no decision of this Court to rely upon, the City invokes the res judicata principles underlying the Full Faith and Credit Act, 28 U.S.C. § 1738 (the "Act"). The City argues that -- when deciding *Williamson County* -- this Court "did not discuss" and "thus did not by its terms create an 'exception' to that Act." Resp. Brf. 21.

As outlined below, however, this Court was fully aware of the Act when it decided *Williamson County*. As in *England*, principles of comity are respected by permitting the state courts an opportunity to determine state law claims that may moot

federal questions, and the rights of litigants and the primacy of the federal courts are preserved by permitting federal claims to be considered in full by the federal courts.

A. This Court Was Well Aware of the Full Faith and Credit Act When it Decided *Williamson County*

The City's legal argument begins with a paean to the virtues of res judicata rules underlying the Full Faith and Credit Act:

> "It is a rule of fundamental and substantial justice[.]"
>
> "The law of res judicata, much more than most other segments of law, has rhyme, reason, and rhythm – something in common with good poetry. Its inner logic is rather satisfying."

Resp. Brf. 16, quoting *Federated Department Stores, Inc. v. Moitie*, 452 U.S. 394, 401 (1981) and *University of Tennessee v. Elliott*, 478 U.S. 788, 798 (1986), quoting 4 K. Davis, Administrative Law Treatise § 21.9 at 78 (2d ed. 1983).

The City confidently asserts that this "rhyme, reason, and rhythm" require the conclusion that "no alleged state or local taking need ever give rise to a meritorious federal claim." Resp. Brf. 27. Accordingly, the "inner logic" that is so "satisfying" tells the City that the Field Brothers' ripe constitutional claims need not be heard by any court, in any jurisdiction.

The Second Circuit and legal commentators disagree. When the res judicata rules are applied unthinkingly to Takings cases, the result, as in the Field Brothers' case, is a "Catch-22." *Santini*, 342 F.3d at 127-130. Among other things, the legal commentators believe that the Ninth Circuit's holding is "Kafkaesque" and "inherently nonsensical." Pet. Brf. 16, citing

Berger, Michael and Kanner, Gideon, *Shell Game! You Can't Get There From Here: Supreme Court Ripeness Jurisprudence in Takings Cases at Long Last Reaches the Self-Parody Stage*, 36 Urb. Law. 671, 702-703 (2004) (citations omitted).

There is an explanation for how the elegant law of res judicata could produce such unjust results in Takings cases. In *Williamson County*, like *Pullman*, this Court set out a procedure that sometimes *requires* two separate litigations. When two proceedings are required to allow the state courts an opportunity to moot federal claims, the second proceeding is, and must be, contrary to the general rules of res judicata. Even the City acknowledges that the law of res judicata "consists entirely of an elaboration of the obvious principle that a controversy should be resolved once, not more then once." Resp. Brf. 16, quoting *University of Tennessee*, 478 U.S. at 798, quoting 4 K. Davis, Administrative Law Treatise § 21.9 at 78. But, that principle cannot be squared with this Court's determination that two separate litigations may be required in Takings cases. *Wilkinson v. Pitkin County Bd. of County Commissioners*, 142 F.3d 1319, 1325 n. 4 (10th Cir. 1998) ("It is difficult to reconcile the ripeness requirement of *Williamson* with the laws of res judicata and collateral estoppel.").

This Court's decisions in *Williamson County* and *Pullman* had more than one issue in mind. In both cases, this Court concluded that state courts should decide state law issues because they might avoid the need to decide the federal issues. *Williamson County*, 473 U.S. at 194-195 (if the state courts award compensation, there is no federal Takings claim); *Railroad Commission of Texas v. Pullman Co.*, 312 U.S. 496, 501 (1941) (if the state law issue is decided in favor of the plaintiff, "the constitutional issue does not arise.") This Court held that the cost of two litigations was an acceptable price.

This Court's decision in *England* decided even more. This Court held that the federal courts are not bound by state law determinations when they consider the federal claims. *England*, 375 U.S. at 417 (party has the "right to litigate his federal claims fully in the federal courts").

The City has a different view: "*England* did not hold that a plaintiff in state court may 'reserve' any 'right' to two full litigations of issues that are relevant to both state and federal claims." Resp. Brf. 22. But, that is *precisely* what *England* held. As this Court explained, once the state courts have decided the state law claims, the federal claims must be resolved without regard to the state court's decision:

> This is true as to issues of law; it is especially true as to issues of fact. Limiting the litigant to review here would deny him the benefit of a federal trial court's role in constructing a record and making fact findings. How the facts are found will often dictate the decision of federal claims. "It is the typical, not the rare, case in which constitutional claims turn upon the resolution of contested fact issues."

England, 375 U.S. at 416-417 (citation omitted). Of course, that is particularly true of Takings claims, which involve "ad hoc factual inquiries." *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, 125 (1978).

After misstating *England*'s holding, the City argues that this Court did not even consider the Full Faith and Credit Act's underlying principles of comity and preclusion. Resp. Brf. 21. But, once again, that was precisely what this Court did consider. In *England*, this Court held that -- when two separate litigations are required -- federal plaintiffs should not be deprived of "their right to a District Court determination of their federal claims." *England*, 375 U.S. at 418; see also *England*, 375 U.S. at 414-415 (recognizing that "established principles will bar a relitigation" and "effectively deprive[] [the plaintiff] of a federal forum").

The Second Circuit agrees, concluding that this Court's rationale in *England* must apply to Takings cases shunted to the state court by *Williamson County*. *Santini*, 342 F.3d at 127-130. While the City does not even mention *Santini*, it does try to distinguish the Second Circuit's decision. The City argues that, under *Williamson County*, the state compensation claims require the state courts to "address[] issues identical to those underlying a parallel federal claim" and that *England* did not consider that situation. Resp. Brf. 22.

The City's "distinction" is hollow. In *Pullman*, as in *Williamson County*, this Court gave the state courts an opportunity to moot the federal constitutional claims. And, under *Pullman*, the state courts are asked to determine state law in a manner that does not violate federal law; i.e., the state courts must consider the factual and legal issues raised by the federal constitutional claims when deciding the state law claims. See *England*, 375 U.S. at 420-421 (If the plaintiff can persuade "the state court that application of the [state] statute to him would offend the Federal Constitution, he will ordinarily

have persuaded it that the statute should not be construed as applicable to him.").[1]

When that endeavor fails under *Pullman* or *Williamson County*, the result is the same. The federal courts are faced with a federal claim that has never been considered by any court in any jurisdiction. In either case, federal plaintiffs with ripe federal claims are entitled to have those claims decided under federal law. As the Second Circuit held:

> "There are fundamental objections to any conclusion that a litigant who has properly invoked the jurisdiction of a Federal District Court to consider federal constitutional claims can be compelled, without his consent and through no fault of his own, to accept instead a state court's determination of those claims."

Santini, 342 F.3d at 128, quoting *England*, 375 U.S. at 415.

[1] The City also argues that *Pullman* and *Williamson County* are different because the ripeness requirement of *Williamson County* is rooted in the Fifth Amendment instead of prudential federalism principles. Resp. Brf. 21-22; but see *Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725, 733-734 (1997) (*Williamson County* is based on "prudential ripeness principles" and establishes "two independent prudential hurdles"). Whether true or not, however, this case does not turn on that issue. Here, as in *Pullman* cases, the Field Brothers were required to proceed in state court before they were permitted to litigate their federal constitutional claims. As the Second Circuit concluded, there is no "meaningful" distinction between *Pullman* and *Williamson County*. *Santini*, 342 F.3d at 129.

Indeed, nothing in this Court's *Williamson County* opinion even suggests that the outcome of state compensation procedures *could* preclude a ripe federal claim. *Williamson County*, 473 U.S. at 185, 186, 194-195, 197, 200; *DLX, Inc. v. Kentucky*, 381 F.3d 511, 523 n. 9 (6th Cir. 2004) (the Ninth's Circuit's rule is "a result clearly not contemplated by the Court in *Williamson County*"). As the Second Circuit concluded, such a result would be flatly inconsistent with this Court's decision in *Williamson County*:

> It would be both ironic and unfair if the very procedure that the Supreme Court required [Takings plaintiffs] to follow before bringing a Fifth Amendment takings claim -- a state court-inverse condemnation action -- also precluded [them] from ever bringing a Fifth Amendment takings claim.

Santini, 342 F.3d at 130.

In sum, when this Court decided *Williamson County*, it was well aware of both the Full Faith and Credit Act and its own decision in *England*. This Court should now instruct the Ninth Circuit that the Field Brothers' federal constitutional claims must be decided on the merits.

B. The City's Remaining Arguments Merely Point out the Inherent Costs of Permitting Two Separate Proceedings, Which this Court Accepted When it Decided *Pullman* and *Williamson County*

The City's other arguments are not doctrinal. The City points out the inherent costs of any judicial doctrine that authorizes two separate proceedings. In the process, the City argues that the Field Brothers have sought delay in this litigation, and that the costs of defending two proceedings

harms the cities. The City's arguments could be relevant only if the City argued that *Williamson County* should be reversed. But, the City vehemently opposes this Court's reconsideration of *Williamson County*. Resp. Brf. 10 n. 13. As outlined below, the City's arguments are not only pointless. They are false.

1. The City's Observations that Other Bodies of Federal Law Do Not Present the Same Issues as *Williamson County*'s Rule Permitting Two Proceedings Merely Point Out the Obvious Costs That Were Fully Considered by this Court Long Ago

Only plaintiffs subject to *Pullman* or *Williamson County* are required to pursue state court claims before they can pursue their federal claims. The City, has uncovered three other bodies of law that it claims are analogous because the plaintiffs are required to proceed in state court even though they have federal claims: state tax, *Rooker-Feldman*, and *Burford* abstention cases. Resp. Brf. 28 n. 20.

The City's proposed analogy does not even address the issues in this case. As the City admits, in all of those cases, plaintiffs are entitled to "press [their] federal constitutional claims" in state court and are "subject [ ] to review by this Court." Resp. Brf. 28 n. 20. Accordingly, there is no need for an exception to normal res judicata rules because those plaintiffs are entitled to only one litigation.

Here, the Field Brothers raise questions that may be presented only by *Pullman* and *Williamson County* plaintiffs. The Field Brothers' ripe constitutional claims have never been considered on the merits. The California courts were given the opportunity to moot the Field Brothers' federal claims by providing compensation under California law, but were not

permitted to decide the federal claims.[2] The contrast should have been clear to the City before it offered the argument. Plaintiffs in state tax, *Rooker-Feldman*, and *Burford* abstention cases are entitled to have their federal claims considered on the merits in the state courts, and, if necessary, are entitled to this Court's review after a final state court determination of the federal claims.

The Field Brothers ask for nothing more. Here, no court in any jurisdiction has applied federal law to decide the Field Brothers' ripe constitutional claims and, if the Ninth Circuit's decision is affirmed, the federal courts will have no jurisdiction over such claims in any future case.

2. The Field Brothers Followed *Williamson County*'s Procedures: Their Actions Provide No Reason to Reconsider Their Right to a Full Merits Determination of Their Constitutional Claims

The City argues that the Field Brothers committed procedural errors, claiming that they should have submitted just their state administrative mandate claim (and not their state law compensation claims) to the state courts, and that they failed to reserve all of their federal Takings claims in the state courts. Resp. Brf. 22 n. 15. The City waived that procedural argument

---

[2] The City does cite to three state court cases holding that state compensation claims and federal Takings claims can be considered simultaneously in state court. Resp. Brf. 25. Those cases, however, violate *Williamson County*'s holding that federal Takings claims may not be brought until the state compensation remedy has been denied. Moreover, the City's reliance on those cases is directly contrary to its repeated assertion that federal Takings claims do not accrue until the state courts have denied compensation. Resp. Brf. 21, 24.

by not raising it in opposition to the petition for certiorari. S. Ct. R. 15.2 (objections based on proceedings below waived unless called to the Court's attention in the brief in opposition); *Oklahoma City v. Tuttle*, 471 U.S. 808, 815-816 (1985) (same). Moreover, the City did not make that argument in its opposition to the petition for certiorari for a good reason. As outlined below, the City's new argument is meritless.

The Ninth Circuit dismissed as unripe the Field Brothers' facial Takings claim to the extent it was based on the economic viability test, and all of their as-applied claims on any Takings theory. *San Remo I*, Resp. Brf. App. 9a, 10a. After that decision, the Field Brothers were required to bring all of their state law compensation claims in state court. In the state court, the Field Brothers reserved all of their federal Takings claims. J.A. 126-127 (reserved § 1983 claim in state court complaint incorporated all allegations of the state law compensation claims, based on facial and as-applied theories); Pet. App. 10a, 67a-68a (court of appeals and district court found that the Field Brothers explicitly reserved their right to litigate their federal claims).

That is a complete answer to the City's procedural argument. The only possible explanation for the City's argument is that it misconstrues the Field Brothers' as-applied Takings claim as three separate claims -- under the substantial advancement, economic viability, and *Penn Central* tests -- and that each required a separate reservation of rights. This Court has already held, however, that the three tests are merely separate theories supporting a single as-applied Takings claim. See *Yee v. City of Escondido*, 503 U.S. 519, 535 (1992) (arguments that an ordinance was a physical and regulatory taking "are not separate *claims*," they are "separate arguments in support of a single claim -- that the ordinance effects an unconstitutional taking").

The City also blames the Field Brothers for their 15-year saga, portraying them as litigants who "snatched delay from the jaws of defeat." Resp. Brf. 2. Although the City's assertion does not seem to have any legal point, the Field Brothers note that they were simply satisfying the requirements of *Williamson County*. At each stage of the proceedings in the federal courts, however, the City argued that the Field Brothers should never receive a hearing on the merits of their federal claims. As the City knew, its ordinance and administrative actions could not withstand scrutiny by a federal court under the Fifth Amendment. Pet. 10-18; J.A. 65.

In sum, the City's attacks on the Field Brothers' conduct are entirely misdirected. The record shows that no Takings plaintiff is more entitled to consideration of their ripe constitutional claims.

3. The City's Argument That *Williamson County* Is Costly to Cities Is Hardly an Answer to the Field Brothers' Right to Have Their Ripe Constitutional Claims Heard and Is, in Any Event, False

The City's final argument concerning the costs of litigating in two proceedings unwittingly shows why it argues against the holding of *Williamson County*, but never asks this Court to overrule the decision. The practical reality facing Takings plaintiffs is that *Williamson County*'s two-proceeding requirement helps cities defeat meritorious Takings claims. No litigant wants to run the gauntlet that the Field Brothers ran. For every plaintiff like the Field Brothers, there are hundreds who surrendered rather than face years of litigation.

The burden of *Williamson County* falls much harder on Takings plaintiffs than on local governments. As Justice William Douglas explained, a doctrine that requires two rounds

of litigation makes "it likely that litigants seeking the protection of the federal courts for assertion of their civil rights will be ground down slowly by the passage of time and the expenditure of money in state proceedings, leaving the ultimate remedy . . . an illusory one." *England*, 375 U.S. at 436-437 (dissenting and arguing that *Pullman* should be overruled). As this twelve-year litigation illustrates, only plaintiffs with compelling federal Takings cases will even attempt to challenge their cities.

In any event, whatever the cost to cities, the Field Brothers are entitled to consideration of their ripe constitutional claims. The City's complaint about the high cost of defending its unconstitutional exactions is hardly worthy of this Court's attention.[3]

II. UNDER CALIFORNIA LAW, A DECISION UNDER STATE LAW THAT THE FIELD BROTHERS' COMPLAINT DID NOT STATE A CLAIM FOR COMPENSATION HAS NO PRECLUSIVE EFFECT ON THE FIELD BROTHERS' FEDERAL TAKINGS CLAIMS

The threshold premise of the City's argument that the Field Brothers' federal claims are precluded under the Full Faith and Credit Act is indefensible. Under California law, the determination that the Field Brothers did not state a claim under California's compensation law is entitled to no preclusive effect in federal court. Not surprisingly, the City consigns its defense of the Ninth Circuit's preclusion decision to a footnote. Resp.

---

[3] Indeed, the City will not pay those legal costs in this case. Under a very recent amendment to the Hotel Ordinance, the costs will be paid from the unconstitutional exactions imposed on hotel owners who could not afford to challenge the City's actions. San Francisco Ordinance No. 133-05, adding § 41.13(f).

Brf. 18 n. 11. In that footnote, the City argues that the Ninth Circuit properly applied California law of issue preclusion, but cites cases in which the state courts determined that the first judgment decided the "identical issue." *Id.*, citing *Lumpkin v. Jordan*, 49 Cal.App.4th 1223, 1231, 57 Cal.Rptr.2d 303, 307-308 (1996); *Calhoun v. Franchise Tax Board*, 20 Cal.3d 881, 884, 574 P.2d 763, 765 (1978).

But, in this case, the Ninth Circuit did not find -- and could not find -- that state compensation law and federal Takings law are identical. See Pet. 10-18 (explaining differences between federal and state law on the merits of the Field Brothers' Takings claims). Instead, the Ninth Circuit precluded the Field Brothers' federal constitutional claim because it found that California law and federal law were "equivalent." *San Remo III*, Pet. App. 16a, 17a. That test has no basis in California law. Pet. Brf. 19-20. The test is whether the California Supreme Court decided an "identical issue." *Lumpkin*, 49 Cal.App.4th at 1231, 57 Cal.Rptr.2d at 307-308.

Rather than defend the Ninth Circuit's alternative formulation -- the "equivalent determination" test -- the City tries to muddy the issue further by stating six alternative tests that also have no basis in California law. Resp. Brf. 10, 13, 14, 15, 18, 22. By arguing that federal law is "largely coextensive," "congruent," "substantially identical," provides an "adequate forum," has no "material differences," and is "analogous," the City apparently hopes that no one will notice that none of these formulations -- including the Ninth Circuit's -- even arguably satisfies California's "identical issue" test.

Finally, the City claims the Field Brothers' argument that the Ninth Circuit's decision was wrong under California law of issue preclusion is beyond the scope of the petition for certiorari. Resp. Brf. 18 n. 11. But, the Field Brothers' petition

does ask whether their claim is barred by issue preclusion. This case is the same as *Migra*, where this Court decided that there is no blanket exempt from issue preclusion for Section 1983 cases, but remanded the claim because it was unclear whether the lower courts had applied state or federal issue preclusion law. *Migra v. Warren City School District Board*, 465 U.S. 75, 87 (1984). If necessary to reach this state law issue, the Field Brothers deserve no less.

In sum, even the City's threshold argument is false. There was no reason -- ever -- to deny the Field Brothers' right to have their ripened constitutional claims considered in full by the district court.

CONCLUSION

The City violated its constitutional responsibilities when it imposed a $567,000 exaction on the Field Brother as a "permit condition" to continue their decades-long and duly-licensed operation of the San Remo Hotel. The Field Brothers have a right to prove it. This Court should remand this case to the district court for a full determination of the merits of the Field Brothers' federal claims.

Dated: March 21, 2005.

PAUL F. UTRECHT
Counsel of Record
ANDREW M. ZACKS
ZACKS UTRECHT &
LEADBETTER, P.C.
235 Montgomery Street, Suite 1130
San Francisco, CA 94104
(415) 956-8100

Attorneys for Petitioners San Remo Hotel, L.P., Thomas Field, Robert Field and T & R Investment Co.